

BEFORE THE FAIR EMPLOYMENT AND HOUSING COMMISSION  
OF THE STATE OF CALIFORNIA

In the Matter of the Accusation ) of the ) ) DEPARTMENT OF FAIR EMPLOYMENT ) AND HOUSING ) ) v. ) ) BAY AREA RAPID TRANSIT DISTRICT; ) MICHAEL MASEK, AS AN INDIVIDUAL ) AND MANAGER; GLADYS MAHER, AS AN ) INDIVIDUAL AND MANAGER; AND JOHN ) MAHER, AS AN INDIVIDUAL AND ) AGENT; UNITED PUBLIC EMPLOYEES ) LOCAL 790 - BART CHAPTER; MILT ) WAALKENS, AS AN INDIVIDUAL AND ) MANAGER; AND JOHN MAHER, AS AN ) INDIVIDUAL AND MANAGER, ) ) Respondents. ) ----- ) - ) ) IMELDA A. LEHNE, ) ) Complainant/Intervenor. ) _____	Case Nos. FEP91-92 M9-1278-00-rse FEP91-92 M9-1278-01-rs FEP91-92 M9-1278-02-rs FEP91-92 M9-1358-00-s FEP91-92 M9-1358-01-s FEP91-92 M9-1358-02-s 97-15  DECISION
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Hearing Officer Prudence K. Poppink heard this matter on behalf of the Fair Employment and Housing Commission on November 4-8, 12-15, 18-19, and December 2 and 6, 1996, in Oakland, California. Michael F. Sweeney, Staff Counsel, and Azita Ghafourpour, Legal Intern, represented the Department of Fair Employment and Housing. James W. Rosenquist, Attorney at Law, represented respondents Bay Area Rapid Transit District, Michael Masek, and Gladys Maher. Vincent A. Harrington, Jr., Attorney at Law, represented respondents United Public Employees, Local 790-BART Chapter, Milt Waalkens, and John Maher. Glen P. Walling, Attorney at Law, represented complainant/intervenor Imelda A. Lehne. Complainant/intervenor and all respondents were present during the hearing. The parties submitted timely post-hearing briefs and the case was deemed submitted on March 3,

1997. Hearing Officer Poppink issued a Proposed Decision in this matter on May 29, 1997.

On June 11, 1997, the Commission decided not to adopt the Proposed Decision and issued a Notice of Opportunity for Further Argument to the parties. Respondent United Public Employees, Local 790-BART Chapter and the Department of Fair Employment and Housing submitted timely further argument; respondent Bay Area Rapid Transit and complainant/intervenor waived further argument.

After consideration of the entire record and all arguments, the Commission makes the following findings of fact, determination of issues, and order.

#### FINDINGS OF FACT

1. On June 1, 1992, complainant/intervenor Imelda A. Lehne (complainant) filed three verified, written complaints with the Department of Fair Employment and Housing (Department) against, respectively, Bay Area Rapid Transit District (BART), John Maher, as an individual, and Gladys Maher, as an individual. The three complaints contained identical allegations that BART, John Maher, and Gladys Maher had, within the previous year, discriminated against complainant because of her sex (female); that John Maher and Gladys Maher had sexually harassed her and retaliated against her; that supervisor Michael Masek had heard one derogatory sexual slur; and that BART had failed to take all reasonable steps to prevent the harassment or to ensure a discrimination-free work environment, in violation of the Fair Employment and Housing Act (Act) (Gov. Code, §12900 et seq.).

2. On June 23, 1992, complainant Imelda A. Lehne filed three verified, written complaints with the Department against, respectively, United Public Employees Local 790-BART Chapter, John Maher, as an individual, and Milt Waalkens, as an individual. The three complaints contained identical allegations that Local 790-BART Chapter, John Maher, and Milt Waalkens had, within the previous year, discriminated against complainant because of her sex (female); that John Maher had sexually harassed her and retaliated against her; and that the Union and Milt Waalkens, union President, failed to take corrective action after being informed of the harassment, in violation of the Act.

3. The Department is an administrative agency empowered to issue accusations under Government Code section 12930, subdivision (h). On June 1, 1993, Nancy C. Gutierrez, in her official capacity as Director of the Department, issued an accusation against Bay Area Rapid Transit District (respondent

BART); Michael Masek, as an individual and manager; Gladys Maher, as an individual and manager (respondent Gladys Maher), and John Maher, as an individual and agent (respondent Maher or John Maher). The accusation alleged that respondent John Maher discriminated against and sexually harassed complainant, that complainant reported the harassment to Masek, and that respondents Gladys and John Maher thereafter retaliated against complainant, in violation of Government Code section 12940, subdivisions (a) and (h). The accusation also alleged that respondents failed to take all reasonable steps to prevent harassment from occurring, in violation of Government Code section 12940, subdivision (i).

4. On June 23, 1993, Nancy Gutierrez, in her official capacity as Director of the Department, issued an accusation against United Public Employees Local 790-BART Chapter (respondent Union or BART Chapter); Milt Waalkens, as an individual and manager (respondent Waalkens); and John Maher, as an individual and manager. The accusation alleged that respondent John Maher discriminated against and sexually harassed complainant, that complainant's husband complained to respondent Waalkens, President of respondent Union; that respondents Union and Maher thereafter retaliated against complainant, and that respondents failed to take all reasonable steps necessary to prevent harassment from occurring, in violation of Government Code section 12940, subdivisions (a), (h), and (i).

5. On June 18, 1993, complainant moved the Commission for permission to intervene as a party in this matter. On June 29, 1993, the Commission granted complainant's motion to intervene.

6. On August 17, 1993, all parties stipulated that the two accusations, described above, be consolidated for all future matters before the Commission.

7. On November 6, 1996, the Department and complainant agreed to dismiss Michael Masek as a respondent in this matter.

8. Respondent BART is a rapid transit district which operates in the San Francisco Bay Area and which is governed by an elected board of directors. In 1992, it had around 2,800 employees. It is an employer within the meaning of Government Code sections 12926, subdivision (d), and 12940, subdivision (h) (3) (A).

9. Respondent Union, or BART Chapter, is a chapter of United Public Employees Local 790 of the Service Employees International Union, which is part of the AFL-CIO. It is a "labor organization" within the meaning of Government Code

section 12926, subdivision (g). In 1991-92, the BART Chapter had around 1350-1400 members.

10. Respondent John Maher has been a Transit Vehicle Mechanic (TVM) for respondent BART since 1974. During the events in this case, he was one of two Vice-Presidents of respondent Union and the East Bay Vice-President of Local 790.

11. Respondent Gladys Maher has been a senior storekeeper, or "lead person," for respondent BART since 1986. Respondents John Maher and Gladys Maher are husband and wife.

12. Michael Masek, a Foreworker III, has been a stores supervisor for respondent BART since August 1989. During the events in this case, he was complainant's and Gladys Maher's immediate supervisor.

13. Respondent Milt Waalkens has been a BART employee since 1970. He has been involved in union politics since the early 1970's, when the BART employees first unionized, and was the President of respondent Union from 1980 until April 16, 1996. During his presidency, he was released from his job duties at BART to conduct union business on a full-time basis.

14. Complainant started working for respondent BART in October 1983, as a Maintenance Worker II, or "storekeeper." BART has six stores, or warehouses, where parts and materials are delivered, stored, repaired, and shipped out to various BART locations. Complainant worked in the Hayward store on the day shift from 1983 until April 30, 1992, except for two years, 1986 to 1988, when she worked in the Oakland store. Her duties included shipping and receiving, inventory control, receiving purchase orders, and issuing parts to the various BART departments. Her job duties as a storekeeper also involved driving a truck one day a week to pick up and deliver materials to the other BART stores.

15. From 1983 until 1986, complainant worked daily alongside respondent Gladys Maher, who was also a storekeeper in the Hayward store. When complainant returned from Oakland to Hayward in 1988, she again worked alongside Gladys Maher, who was now her lead person. As lead person, Gladys Maher was in charge of assigning various tasks to the storekeepers, including complainant, and making up the weekly assignment schedule.

16. At the time of complainant's hire in 1983, respondent John Maher worked at the Hayward facility as a TVM. He had been involved in union politics since the 1970's, and had defeated respondent Waalkens in an election for the presidency of respondent Union in 1978, only to be defeated himself by Waalkens

in 1980. In 1987, respondent Maher became the Chief Steward for the maintenance workers.

17. At some point during her employ, complainant also became involved in union activities and was elected Area Steward of storekeepers at the Hayward store. In September 1987, complainant was elected for a three-year term as Chief Steward for the storekeepers at all six BART stores; in 1990, she was re-elected for another three-year term. In her capacity as Chief Steward, complainant handled storekeeper grievances at the first and second level and counseled employees. Complainant received release time from BART to attend monthly meetings of the Chief Stewards' Council, meet with management representatives, and attend grievance or discipline hearings. Once released by her supervisor to conduct union business, complainant functioned under the direction and control of respondent Union, not respondent BART.

18. In 1990, respondent Union amended its by-laws to create a Second Vice-President position. That year, respondent Waalkens, Dennis Kaczor, and respondent John Maher successfully ran as a slate for President, First Vice-President, and Second Vice-President, respectively. This ended a power struggle between respondents Maher and Waalkens, which had gone on since 1978, and they became political allies rather than enemies.

19. In 1990, respondent Waalkens gave Dennis Kaczor the responsibility of overseeing foreworkers, lead persons, and the clerical unit. Waalkens gave respondent John Maher the oversight responsibility for the maintenance and stores department. Maher was the union official to whom complainant, as Chief Steward, reported. Maher regularly spent one day a week at the Hayward shop on union business.

20. Pursuant to the terms of the union contract, all three top union officials are released from their job duties at BART to perform union business, both on and off BART property, on a full-time basis during their tenure in office.

21. The contract between respondents Union and BART was due to expire June 30, 1991. In late 1990, complainant was elected by the stores department to be one of 40 bargaining team representatives for the upcoming negotiations. The representatives then voted for seven of their group to be the actual union negotiators. Complainant came in eighth in the balloting, but, since there were no storekeepers among those elected, respondent John Maher replaced one of them with complainant. The final negotiating team consisted of ten men and five women, and included all of the elected union officials. With the exception of Larry Gerber, East Bay staff director and labor representative for Local 790, all of the union negotiators

were BART employees. Pursuant to the terms of the union contract, the negotiators were released from BART to the Union full time during the time of the negotiations, but continued to get paid and receive benefits by BART. Negotiators reported to the negotiating session every day, but notified their BART supervisor if they were absent or sick, so that any time off could be charged against their accrued sick leave.

22. There were three negotiating sessions in 1991. The first was at the Hilton Hotel in Oakland from February 4 through March 31, 1991. The second session was at the Clarion Hotel in Oakland from May 28 through June 30, 1991. This session was unsuccessful and respondent Union called a strike for midnight June 30, 1991. Governor Wilson immediately ordered a 60-day cooling-off period. A third round of negotiations occurred at various locations in August and a contract was finally reached in early September 1991.

23. In 1990, when respondent John Maher was elected Second Vice-President of respondent Union, complainant was very happy. She had had a good and close working relationship with Maher and was in his political "camp." Both respondents John and Gladys Maher had encouraged complainant to run for steward in 1987, and supported her in these efforts. As Chief Steward, complainant spoke with respondent Maher on a regular basis, strategizing about union business and how to deal with the various individual grievances which she was handling. Occasionally, they would go out for a drink after conducting some union business, either by themselves or with other people. Complainant also had a good working relationship with respondent Gladys Maher, with whom she worked on a daily basis. The two were very friendly and complainant was happy and successful in both her job at BART and her union duties.

24. At the beginning of the negotiations, respondent Waalkens spoke to all of the negotiators about behaving professionally, particularly since the male and female negotiators would be working in close proximity to each other.

25. During the first bargaining session, complainant and respondent John Maher interacted frequently and sat together during many of the negotiating sessions. At times, complainant and/or respondent Maher would join others for a drink at the end of the day.

26. By the beginning of the second negotiating session, from the end of May 1991 through June 30, 1991, the relationship between complainant and respondent Maher had cooled considerably. The change in their relationship was obvious to the other members of the negotiating team. They did not sit or interact

together as they had previously done and did not appear to be getting along.

27. While on release time from BART, and while on union business, respondent John Maher subjected complainant to the following incidents of unwanted sexual conduct:

a. Respondent John Maher began to flirt with complainant during the first negotiating session in ways which made complainant feel uncomfortable. When they would go out for a drink after a session, he would urge her to stay, saying, "We can have a good time if you stay over a bit longer." Complainant always refused.

b. On May 16, 1991, complainant asked John Maher to accompany her to the Richmond store to talk to a storekeeper who had a grievance. Complainant drove and, on the way back, John Maher asked her personal questions about her marriage and if she ever had had an affair. Complainant confided that she had had an affair with a co-worker years ago during a brief period of time when her marriage was rocky; she refused to divulge the co-worker's name to Maher, despite his asking. John Maher then asked complainant to go out with him and put his hand on her leg, rubbing it. Complainant told him to keep his hands to himself. John Maher then proceeded to grab her right breast as she was driving. Complainant was shocked, upset and angry. She did not speak to Maher again and dropped him off at the union hall, went home and told her husband about the incident.

c. On several occasions during the negotiations, John Maher asked complainant to come up to "his room" at the hotel.

d. In June of 1991, during the second round of negotiations at the Clarion Hotel, John Maher grabbed complainant when they were alone in the hallway, pinning her arms so that she could not move and attempted to kiss her. Complainant pushed him away and did not let him kiss her.

e. In June 1991, complainant went to the union hall to try to get evidence of John Maher's harassment of her. At her husband's suggestion, she carried a tape recorder hidden in her purse. She met with Maher alone in his office to discuss a union grievance which she had and Maher told her, "Let it go, stay over, and I will take care of all of your problems." Maher then reached over the desk top to grab her hands, but did not actually touch her. Complainant told him that he was "going to get into trouble for this" and then she got very nervous and left.

28. In late June 1991, after the above incident, complainant told respondent John Maher that she did not want him ever to touch her again and that she had evidence of him sexually harassing her on a tape. Maher told her he did not know what she was talking about and to go ahead and play the tape. He was angry with complainant. Their relationship cooled rapidly from this point on, although they continued to conduct union business whenever necessary. Maher did not make any more sexual overtures or remarks to complainant after this discussion.

29. Complainant met with an attorney regarding her problems with respondent Maher on August 26, 1991. Acting on his advice that the tape she had made of John Maher was unlawful, complainant taped over parts of the tape. At hearing, no tape was offered into evidence.

30. Complainant did not complain to anyone in either BART management or the union management about any of the above incidents. At no time did she file a grievance or internal complaint with respondent Union or a complaint with respondent BART's Affirmative Action office. Complainant did not complain because she did not think she would be believed over John Maher, did not want to create a scandal during the negotiations process, and did not want to destroy her working relationship with Gladys Maher.

31. During the negotiations, complainant strongly supported a proposal from the storekeepers that BART create a separate truck driver classification in the stores department, so that the storekeepers would not have to drive the trucks as part of their duties. This issue was, in union parlance, complainant's "sacred cow," an issue about which she felt strongly. In late June 1991, the union bargaining committee voted to remove this issue, as well as others, from the bargaining table, although, for strategy reasons, it did not actually withdraw the truck driving proposal until the third negotiating session. Complainant felt that respondent John Maher had not supported her on this issue to the extent that he should have, and was angry at him because of this.

32. After the contract was signed in early September 1991, complainant returned to the Hayward store and resumed her regular storekeeper and Chief Steward duties.

33. Complainant also had an individual grievance regarding the truck driving issue, which had been pending since 1988. Her understanding was that if the Union dropped the truck driving issue from the bargaining table, it would pursue her grievance with BART over the same issue. On September 23, 1991, the Union settled the grievance and complainant was very unhappy that the settlement still allowed the supervisor to assign



driving duties. Although she signed off on the grievance settlement, at some point she wrote on it, "I strongly disagree with this settlement, but John overpowered my opinion." She openly communicated her distress and anger to some of her co-workers, telling them that she was very upset that John Maher had not supported her on the truck issue, that she had not agreed to the settlement, and that she would "fix" him and get even with him and put him back in the "pit" (working again as a BART mechanic). Despite the settlement, complainant told some co-workers that they did not have to drive the truck.

34. In early January 1992, respondent John Maher held a meeting with the storekeepers in the Hayward shop to explain the settlement of complainant's truck driving grievance and to tell the storekeepers that they could be written up for insubordination if they refused to drive the truck. Complainant was upset with Maher as a result of this meeting.

35. In January 1992, respondent Waalkens, in his capacity as union President, unilaterally removed Vice-President Dennis Kaczor from overseeing the clerical unit because he had become romantically involved with Maria Griffin, Chief Steward of the clerical unit. Waalkens felt that this created a conflict of interest.

36. On February 3, 1992, Maria Griffin, who was the chairperson of respondent Union's Affirmative Action Committee, sent respondent Waalkens a memorandum about "the issue of Imelda Lehne and her concerns." She wrote, "As you know, she has made several innuendoes to me regarding John Maher and his actions. When I have spoken to her, she has stated that I just don't know John that well." Griffin recommended to Waalkens that the Union conduct sexual harassment training for the union officers and stewards and adopt written "Affirmative Action Guidelines." She also recommended that John Maher be removed from being overseer of the stores department, "at least until Imelda's issues are resolved."

37. Sometime in February 1992, Rick Rubio, one of complainant's co-worker storekeepers, circulated for signature a petition to recall complainant as Chief Steward of the storekeepers. Rubio felt that complainant talked too freely about the grievances she was handling and was "slamming union brothers" in the process. Respondent Gladys Maher signed the recall petition, as did many others in the pro-Maher camp in the stores department.

38. After complainant found out that the recall petition was being circulated, she was extremely angry and upset and was convinced that John Maher was behind the recall effort. On February 27, 1992, complainant's husband, Frank Lehne (Lehne),

called respondent Waalkens to complain about John Maher. He told Waalkens that complainant and John Maher were not getting along and asked Waalkens to remove Maher from overseeing the stores, thus removing complainant from John Maher's jurisdiction. When Waalkens told Lehne that he could not remove Maher without a vote of the Chief Stewards' Council, Lehne told him that complainant and John Maher had been "having a lot of problems," that Maher had been sexually harassing his wife, and that he had a tape to prove it. Lehne said that neither he nor his wife wanted any trouble for either Gladys or John Maher and that they wanted to keep the information confidential; they simply wanted Maher removed from being complainant's representative, just as Waalkens had removed Dennis Kaczor from overseeing the clerical unit. Respondent Waalkens told Lehne that his allegations were serious charges which required investigation and that Waalkens could not guarantee confidentiality. Waalkens called Lehne back a few days later and told him that he had asked Larry Gerber, staff person for Local 790, to investigate the allegations of sexual harassment. Waalkens himself never talked to complainant or to Lehne again about these issues.

39. Larry Gerber tried to contact Frank Lehne by telephone over a two-week period, leaving six messages on the Lehne's answering machine and asking for a call back. It was Gerber's understanding from respondent Waalkens that Gerber was to contact only Lehne in conducting his investigation, per Lehne's request. Thus, he never approached or talked to complainant about her allegations, even though he saw her on union business during this time period; she, also, never approached Gerber. Neither complainant nor her husband responded to any of Gerber's contacts. As part of his investigation, Gerber also spoke to respondent Maher about complainant. Maher denied that anything had occurred and told Gerber that "he didn't fuck her." On March 23, 1992, Gerber wrote Lehne a letter saying that since Gerber had not heard from him as of that date, despite Gerber's efforts to reach him, Gerber saw "no reason to pursue any further investigation of the matter" and "based upon this, I would find your allegations to be without merit."

40. After Frank Lehne's call to respondent Waalkens, rumors quickly circulated in the Hayward store about complainant's allegations against John Maher. Gladys Maher was furious with complainant and called her a "liar" on at least two occasions in the workplace and told other co-workers she thought that complainant was lying about her husband. Gladys Maher also called complainant a "bitch" on several occasions in the workplace and within hearing distance of another co-worker. By March 1992, complainant had become increasingly uncomfortable going to work and having to work alongside Gladys Maher.

41. On March 5, 1992, Michael Masek, supervisor of the Hayward store, called a meeting to deal with the tension between respondent Gladys Maher and complainant and his fear that the conflict would "spill over into the workplace." The day before the meeting, Masek asked Al Garcia, a BART manager, to be present representing management and told Garcia that there was a problem between Gladys Maher and complainant. Before this meeting, both Masek and Garcia had heard rumors about complainant's allegations that respondent John Maher had made sexual advances to her during the union negotiations and understood complainant to have filed a complaint with the Union regarding the issue. Gladys Maher, complainant, Mel Iken from respondent Union, Garcia, and Masek attended the meeting. Before Masek arrived, Gladys Maher, who was very angry, said that complainant was lying and that her husband had made no advances toward her, calling complainant a "liar" and a "bitch." Mel Iken also told Al Garcia, "This is a union problem and we're taking care of it." When Masek arrived, he reminded everyone that personal problems should be set aside in the workplace and immediately began reading Article 112 from BART's Policies and Procedures Manual, regarding behavior in the workplace. After he finished reading, Masek got up and left the room with Garcia. The meeting lasted under five minutes and Masek allowed no discussion.

42. On March 11, 1992, respondent Union held its monthly Chief Stewards' Council meeting. At this meeting, the stewards determined that the recall petition regarding complainant could proceed to a vote by the storekeepers. Also at this meeting, complainant formally requested that respondent Maher be removed from being overseer of the stores, because of a conflict of interest in that his wife, Gladys Maher, worked in the stores department as a lead worker. During her presentation, complainant did not mention any sexual harassment, threats, or retaliation against her by John or Gladys Maher. There was "table talk" about complainant's allegations against John Maher, but Larry Gerber told the group that the charges were under investigation and thus could not be discussed. The vote was nine to six to deny the change in respondent Maher's representation. Complainant felt very humiliated after this meeting.

43. Complainant resigned from her position as Chief Steward on March 23, 1992. Consequently, there was never an election on the recall petition.

44. Complainant became increasingly stressed by the hostility she felt in her work environment from both Gladys and John Maher, as well as from some of the other storekeepers. She felt that Gladys Maher talked about her behind her back and generally acted in a retaliatory fashion toward her. Complainant took sick leave from March 26 through March 31, 1992, and then went on a job-related stress/disability leave as of April 30,

1992. She first saw Dr. Nancy Van Couvering, a licensed psychologist, for her stress on May 11, 1992, and saw her 23 times during 1992. Dr. Van Couvering diagnosed complainant as having a situational adjustment disorder caused by her work situation, particularly her "exposure to John and Gladys Maher and her feeling of intense vulnerability; that she was not being supported by the Union or by BART." As of the date of hearing, complainant continued to see Dr. Van Couvering, albeit on a more infrequent basis.

45. Complainant remained on disability stress leave and did not work as a storekeeper from April 30, 1992, until March 1996. On March 11, 1996, she returned to the Oakland store as a storekeeper, where she continued to work as of the date of hearing.

46. In mid-1993, Vice-President Dennis Kaczor and Chief Steward Maria Griffin had a falling out with respondent Waalkens and Waalkens stripped Griffin of all of her union committee assignments. In 1996, Dennis Kaczor defeated Waalkens for the presidency of respondent Union in a hotly contested election. As of the date of hearing, Dennis Kaczor and respondent Waalkens remained political enemies, with John Maher supporting Waalkens and Maria Griffin supporting Kaczor.

47. Respondent Union first instituted sexual harassment training for its officers and stewards in December 1993 and first adopted an anti-sexual harassment policy in 1993 or 1994.

48. At all times relevant to the events in this case, respondent Union had a three-member Affirmative Action Committee which met on a regular basis with respondent BART's Affirmative Action Department.

49. Victor Martinez has been respondent BART's Manager of Affirmative Action programs since February 1990, and, since June 1991, has been in charge of training and dealing with internal discrimination complaints. BART has provided sexual harassment training since 1985 for its new hires, new and newly promoted managers/supervisors and newly promoted foreworkers. On a yearly basis, BART management sends its anti-harassment policy, endorsed by BART's General Manager, to each BART employee at his or her home address.

#### DETERMINATION OF ISSUES

##### Procedural Issues

Several procedural issues have been raised by the parties. First, respondent Union argues that the accusations in this matter were untimely since they were not issued "within" one year of the dates of the underlying complaints, as required by Government Code section 12965, subdivision (a). The two accusations were issued on June 1, 1993, and June 23, 1993, the anniversary dates of the filing of the two complaints on June 1, 1992 (against respondent BART et al.), and June 23, 1992 (against respondent Union et al.).

In California, the method of calculation is to not count the first day of a relevant time period, but, instead, to count the last day. (Civ. Code, §10; Code of Civ. Proc., §12; Gov. Code, §6800.) Thus, the limitation period for a complaint filed June 1, 1992, begins to run on June 2, 1992, and ends on June 1, 1993. (See Wixted v. Fletcher (1961) 192 Cal.App.2d 706, 707 [holding a negligence complaint filed on the anniversary of the accident timely because the one-year period commenced the day after the accident at issue].) We thus determine that the accusations in this case were issued in a timely manner and that we therefore have jurisdiction.

Second, respondent Union argues that many of the sexual harassment allegations in this matter are time-barred by Government Code section 12960. That section states, "No complaint may be filed after the expiration of one year from the date upon which the alleged unlawful practice . . . occurred." Since complainant filed her two complaints on June 1, 1992, and June 23, 1992, respondent Union argues that allegations of harassment occurring prior to June 1, 1991, are time-barred.

We have previously rejected the argument that evidence of acts occurring more than one year prior to the date the complaint was filed must always be excluded as untimely. When some of the alleged events occurred during the relevant one-year time period, we have found relevant, and allowed into evidence, proof of earlier acts as well. (DFEH v. California State University, Hayward (1988) FEHC Dec. No. 88-18, at pp. 15-16 [1988-89 CEB 6].) The evidence may, in an appropriate case (which we have not found here; see discussion at page 25), demonstrate a continuing violation, where there may be an ongoing series of harassing acts, some of which fall outside the one-year time period, but some of which continue into the one-year period. (Accardi v. Superior Court (1993) 17 Cal.App.4th 341, 349; Fisher v. San Pedro Peninsula Hospital (1990) 214 Cal.App.3d 590, 613; Watson v. Department of Rehabilitation (1989) 212 Cal.App.3d 1271, 1290-91. Cf. Strother v. Southern California Permanente Medical Group (9th Cir. 1996) 79 F.3d. 859, 868, fn. 11.)

Finally, the Department has moved to amend the accusation. In its original accusation, the Department charged

respondent Union with a violation of Government Code section 12940, subdivisions (a) and (h). In its further argument, the Department moved for permission from the Commission to file an amended accusation, charging respondent Union with a violation of Government Code section 12940, subdivision (b). Government Code section 12940, subdivision (b), makes it an unlawful employment practice,

For a labor organization, because of the race, religious creed, color, national origin, ancestry, physical disability, mental disability, medical condition, marital status, or sex of any person, to exclude, expel or restrict from its membership the person, or to provide only second-class or segregated membership or to discriminate against any person because of the . . . sex of the person in the election of officers of the labor organization or in the selection of the labor organization's staff or to discriminate in any way against any of its members or against any employer or against any person employed by an employer.

Respondent Union opposes such amendment, arguing that the Department and complainant/intervenor had over four years to investigate and litigate the case and had ample opportunity to charge respondent Union with the relevant section of the Fair Employment and Housing Act. If the Commission permits such amendment, respondent Union argues prejudice to its case and asks that the record be reopened for further hearing.

The Administrative Procedure Act grants very broad authority to amend the pleadings in administrative adjudications, even after the evidence has been presented. Under Government Code section 11516, we have the authority to "order amendment of the accusation after submission of the case for decision." Pursuant to this authority, we have decided to allow the Department to amend the accusation to add a charge of a violation of Government Code section 12940, subdivision (b). In doing so, we find no prejudice against respondent Union. The proposed amendment merely adds an additional legal theory of sexual harassment by respondent Union, and it does not alter the material factual issues or affect the evidence presented at the hearing. Respondent Union fully litigated the issues of whether sexual harassment occurred and its responsibility for the conduct of its officers Maher and Waalkens. Adding an additional theory does not adversely affect respondent Union's rights. That conclusion is particularly clear in light of our ruling on the merits of the Department's amendment (see below, at pages 23-26), where we have concluded that the Department has not proven a

violation of Government Code section 12940, subdivision (b), by the Union.

A. Sexual Harassment

The Department claims that respondents sexually harassed complainant in violation of Government Code section 12940, subdivisions (a) and (h). Sexual harassment constitutes discrimination "because of sex" within the meaning of the Act. (Gov. Code, §12940, subd. (h)(3)(C); Cal. Code of Regs., tit. 2, §§7287.6, subd. (b), and 7291.1, subdivision (f)(1); DFEH v. Madera County (1990) FEHC Dec. No. 90-03, at p. 19 [1990-91 CEB 1].) If a preponderance of all the evidence demonstrates that unwelcome sexual conduct or other hostile or unwelcome conduct linked to sex has occurred, that this conduct led to the deprivation of an employment benefit or benefits, and that respondents can be held liable for these actions, we will determine that respondents have engaged in unlawful sexual harassment. There is no affirmative defense which would render such harassment lawful. (DFEH v. Madera County, *supra*, 1990-91 CEB 1, at p. 19; DFEH v. Del Mar Avionics (1985) FEHC Dec. No. 85-19, at p. 18 [1984-85 CEB 16].)

1. Whether Unwelcome Sexual Conduct Occurred

Complainant testified that respondent Maher subjected her to unwelcome verbal sexual comments and two incidents of physical touching or grabbing during May and June 1991. Respondent John Maher denied behaving in this manner.

Both respondents BART and Union argue that complainant fabricated these charges. They assert that complainant was highly upset at John Maher over what she perceived was his failure to support her "sacred cow" truck driving issue during the 1991 union negotiations. **They maintain that the evidence showed, by complainant's own admission as well as by testimony of other witnesses, that complainant was determined to "fix" Maher and "get even with him" for this failure.**

We must first, therefore, resolve the substantial credibility issues in the case to determine whether the unwelcome sexual conduct occurred as alleged. Preliminarily, we note that the record is replete with motive for lying on every side and by almost every witness. The shifting allegiances within the politics of respondent Union during the time period from 1990 to the date of hearing in 1996 made suspect the testimony of more than one witness.

For the following reasons, we believe complainant's testimony that respondent John Maher engaged in unwelcome sexual

conduct during the car ride from Richmond in May 1991. Because we believe complainant on this central issue, we also believe her testimony regarding the other incidents of harassment.

Complainant testified that, during a car trip with respondent John Maher in May 1991 from Richmond on union business, Maher asked her to have an affair with him, put his hand on her leg, and grabbed her right breast while she was driving. It is undisputed that respondent John Maher and complainant went to Richmond on union business on May 16, 1991; John Maher's testimony and daily calendar confirmed such a meeting. Maher testified, however, that they went in separate cars; therefore, he could not have harassed her as alleged. But on two separate occasions prior to hearing, Maher admitted driving with complainant to Richmond in May 1991. Sometime in 1992, during BART's investigation of complainant's DFEH complaint, he told the BART investigator that he had done so; he also stated this under oath during his deposition in 1994. At hearing, however, Maher testified that he had since had his memory refreshed by looking at his daily calendars for 1990 and 1991; it was, he testified, for a meeting in 1990, not 1991, that he and complainant drove together to Richmond. Maher's daily calendars do reflect two meetings in Richmond with complainant, one in June 1990 and one in May 1991; they do not, however, reflect the mode of transportation. On balance, we believe Maher's earlier and more contemporaneous admissions that it was the 1991 meeting to which he and complainant drove together.

Respondents argue that we should not believe complainant's account of John Maher's conduct during this trip because she did not record it anywhere or tell anyone of it. Although it is true that complainant's daily calendar, also in evidence, does not reflect any meeting in Richmond on May 16, 1991, or any harassment of her by Maher, this means only that complainant did not put everything in her calendar, since John Maher conceded that there was a meeting in Richmond on this date.

We cannot infer from the fact that complainant did not report this incident to anyone that it did not happen. There are many plausible reasons why women do not report harassment of them by a supervisor or someone else in a position of power over them.

(DFEH v. Del Mar Avionics, supra, 1984-85 CEB 16, at p. 15.) Here, complainant testified that she did not tell anyone about the incident, except her husband, fearing to jeopardize the union negotiations and fearing that she would not be believed over John Maher; she also did not want to jeopardize her friendship and working relationship with Gladys Maher. We find these fears reasonable, at least at that time, in light of the testimony of Larry Gerber, a Local 790 staff person at the time and one of the few disinterested witnesses at hearing, that any scandal or



internal union complaint would be highly disfavored during the time of the actual negotiations. Additionally, the evidence showed that John Maher was in a position of much greater power and influence in the Union than was complainant, and that complainant highly valued her relationship with Gladys Maher.

We believe complainant's testimony about John Maher's behavior during this car ride for several reasons. First, if complainant fabricated her story, we find it hard to believe that she would have made up information potentially damaging to herself and her relationship with her husband, i.e., her testimony that she told Maher during the car ride that she had previously had an affair with a co-worker during a time when her marriage was going through a bad stretch. Second, the fact that complainant's testimony was not always internally consistent as to dates, places, and the sequences of various events does not mean that we cannot believe the substance of her testimony. We find that she was, in general, a credible witness and consistent over three days of testifying about the substance of the central events of the case, that is, the behavior of John Maher. Neither complainant's testimony, nor that of her husband, sounded rehearsed or programmed, nor did their demeanor while testifying convince us that they were good enough actors to fabricate a story and sustain a performance throughout the long and protracted hearing.

Finally, there was independent evidence that, almost immediately after this car incident, the relationship between complainant and John Maher changed for the worse. Virtually every witness testified that, by the beginning of the second round of negotiations, they noticed a cooling of the previously very close relationship between the two. Complainant and Maher no longer sat or interacted together.

Although respondents argue that complainant was by that time highly upset with respondent Maher for not supporting her on the truck driving issue during the union negotiations, the evidence does not bear out this timing. It is true that complainant later became extremely upset with Maher for not supporting her "sacred cow" to the extent she felt he should and for settling her individual grievance on the same issue on what she felt were unsatisfactory terms. But the evidence showed that the truck driving issue was still on the table at the beginning of the second round of negotiations. And, complainant's individual grievance was not settled until September 1991. Thus, complainant had little reason to alienate Maher at the end of May 1991; indeed, he was still, at that time, her main supporter on the truck driving issue. Thus, we conclude, something else must have happened to cool their relationship between the end of the first and the beginning of the second round of negotiations. We believe complainant that what happened was John Maher's unwelcome sexual conduct toward her in the car on May 16, 1991.

Because we believe complainant's testimony regarding the May 1991 car incident, we also believe her testimony regarding the comments and physical touching in late June 1991. Although this testimony was uncorroborated by any witness, this is often the situation in sexual harassment cases, where the harassing conduct occurs in private. (DFEH v. Community Hospital of San Gabriel (1986) FEHC Dec. No. 86-08, at p. 9, fn. 3 [1986-87 CEB 2]; DFEH v. Fresno Hilton Hotel (1984) FEHC Dec. No. 84-03, at p. 25 [1984-85 CEB 2].)

For all of the above reasons, then, we determine that respondent John Maher submitted complainant to the unwelcome sexual conduct to which she testified.

## **2. Deprivation of Discrimination-Free Work Environment**

The Department argues that the unwelcome sexual conduct complainant suffered deprived her of the benefit of a "discrimination-free workplace," a work environment free of harassment. (Cal. Code of Regs., tit. 2, §§7286.5, subds. (f) and (f)(3), and 7287.6, subd. (b).) Conduct of this kind which deprives its victims of this substantial benefit is itself unlawful under the Act, whether or not the conduct also results in the loss of some more tangible employment benefit, such as a promotion, a pay increase, or the job itself. (Gov. Code, §12940, subd. (h)(1); Cal. Code of Regs., tit. 2, §7287.6, subd. (b); Fisher v. San Pedro Peninsula Hospital, *supra*, 214 Cal.App.3d 590, 608 (hereinafter "Fisher"); DFEH v. Madera County, *supra*, 1990-91 CEB 1, at p. 20].)

Unwelcome sexual conduct deprives its victim of a discrimination-free work environment, within the meaning of the Act and our regulations, when the conduct is either sufficiently severe or sufficiently pervasive that the conduct would create an intimidating, oppressive, hostile, or offensive work environment or otherwise interfere with that person's emotional well-being or her ability to perform her work duties. (Fisher, *supra*, 214 Cal.App.3d 590, 609, *citing Meritor Savings Bank v. Vinson* (1986) 477 U.S. 57, 67; DFEH v. Del Mar Avionics, *supra*, 1984-85 CEB 16, at p. 18]; Kelly-Zurian v. Wohl Shoe Company (1994) 22 Cal.App.4th 397, 412.)

All of the unwelcome sexual conduct which we found to have occurred took place in May and June 1991, on union business or during the time of the union negotiations. Even though complainant and John Maher continued to be BART employees and to be paid by BART, the evidence showed that BART had no control over either of them once they were released to conduct union

business. Thus, during the time of the actual harassment, there was no "work environment" at BART to be affected.<sup>1/</sup>

To the extent that the Department is arguing that complainant's work environment was adversely affected after she returned to work in September 1991, we find that the Department did not prove a causal connection between the earlier sexual harassment and any subsequent actions of John Maher toward complainant.

We do not question that complainant was in fact very upset during her last months on the job; her distress was well documented by her own testimony and that of her psychologist, Dr. Van Couvering. We are, however, unable to conclude that John Maher's interactions with complainant in the workplace between September 1991 and April 1992 were harassing or retaliatory, within the meaning of Government Code section 12940, subdivisions (a) or (h). The record is replete with evidence that, by the fall of 1991, complainant and John Maher were not getting along for multiple reasons. Complainant had been unsuccessful at the bargaining table regarding her "sacred cow" issue, her individual grievance was settled in a way she did not like, and, eventually, a recall petition was circulated against her. Although she testified that she believed that John Maher was behind all of these actions, and that he was doing them to "harass" her, the evidence did not support her belief. The evidence showed that there were good reasons behind the decisions to drop the truck driving issue during negotiations and to settle complainant's grievance. The evidence also showed that John Maher did not have anything to do with the initiation of the recall petition. Complainant's co-worker, Rick Rubio, testified convincingly that he had been the one behind the petition for reasons unconnected with the issues in this case.

The Department did not prove a causal connection between John Maher's earlier off-site sexual harassment of complainant in May and June 1991, and his subsequent interactions with her in the BART workplace in late 1991 and early 1992. We determine, therefore, that complainant's work environment at BART

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<sup>1/</sup> Although complainant returned briefly to the BART worksite between the first and second round of the negotiations, there was no evidence, nor did the Department claim, that her worksite was affected by John Maher's actions during this time.

in this period of time was not made oppressive, hostile or offensive because of John Maher's earlier sexual advances to her, or because of her response to these advances.

3. Deprivation of Discrimination-Free Labor Organization Environment

The Department has alleged that respondent Union violated Government Code section 12940, subdivision (b), which makes it unlawful for a labor organization "to discriminate against any person because of the sex of the person . . . or to discriminate in any way against any of its members." While this provision does not expressly prohibit sexual harassment by a labor organization, it is well settled that sexual harassment constitutes a form of sex discrimination prohibited by the Act. (Accardi v. Superior Court, supra, 17 Cal.App.4th 341, 348; Fisher, supra, 241 Cal.App.3rd 590, 605-06.) Therefore, the prohibition against sex discrimination in subdivision (b), necessarily prohibits a labor organization and its officers from engaging in sexual harassment toward union members.

In addition to the statutory language, there are strong policy reasons for applying subdivision (b) to prohibit sexual harassment by a labor organization. Like an employer, a labor organization can have a profound effect on an employee's job and working conditions. Unions serve as their members' exclusive representative in all dealings with management, ranging from collective bargaining of wages and other employment terms to individual representation of employees in their grievances with management. Unions also operate in the context of an organizational hierarchy, through which officers, stewards and other officials can exert authority over their subordinates. Because of these factors, there is every reason why the Act should prohibit sexual harassment by a labor organization to the same extent that it prohibits sexual harassment by an employer.<sup>1/</sup>

In deciding claims under section 12940, subdivision (b), we accordingly apply a standard similar to that we have used to assess claims of work environment sexual harassment in employment under Government Code section 12940, subdivisions (a) and (h). Such a violation of subdivision (b) is proven if a preponderance of all the evidence demonstrates that unwelcome conduct or other hostile or unwelcome conduct linked to sex has occurred, and that this conduct was either sufficiently severe or sufficiently pervasive that the conduct would create an

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<sup>2/</sup> Additionally, Government Code section 12940, subdivision (h), requires a labor organization, as a covered entity, to "take all reasonable steps to prevent harassment from occurring."

intimidating, hostile, or offensive labor organization environment, or otherwise interfere with the labor member's emotional well-being or his or her ability to perform his or her labor organization duties. (Cf. DFEH v. University of California, Berkeley (1993) FEHC Dec. No. 93-08, at p. 23 [1992-93 CEB 3]; Fisher, supra, 214 Cal.App.3d 590, 607-610.

We have already determined that respondent John Maher engaged in the unwelcome conduct as testified to by complainant.

We must now decide if this conduct created a hostile labor organization environment within the meaning of our legal standard. We conclude that it did not.

Under Fisher, supra, 214 Cal.App.3d 590, 609, whether the sexual conduct complained of is sufficiently pervasive or severe to create a hostile environment must be determined from the totality of the circumstances. Factors to be considered are: the nature of the unwelcome sexual acts, with physical touchings usually being more offensive than verbal behavior; the frequency of the offensive encounters; the total time period over which the behavior takes place; and the context in which the conduct occurred. (Id., at p. 610.)

We have already found that conduct occurring prior to the one-year time period set forth in Government Code section 12960 can be relevant and admissible. We must now decide a second issue: whether the acts occurring within the one-year time limit were sufficiently severe or pervasive to impact adversely on complainant's labor organization environment. As the court held in Fisher, supra, at p. 613,

Although acts beyond the statute of limitations might be relevant to showing a pattern of continuous harassment (citations omitted), if only a couple of acts occurred during the one year preceding the filing of the complaint, then Ms. Fisher cannot properly plead a claim for environmental sexual harassment.

Here, the relevant time period is June 1, 1991, to June 1, 1992, the date on which complainant filed her first complaint with the Department. The evidence showed that the first unwanted touching incident happened in May 1991, outside of the time period. Within the time period, the evidence showed that there was one touching incident sometime in June 1991, and some flirting and unwelcome sexual verbal comments, also in June 1991 (see Finding of Fact 27). By complainant's own testimony, respondent John Maher ceased making any sexual comments or overtures to her by the end of June 1991, when she confronted him with the tape recording.

We find that these incidents in June 1991, although inappropriate, were neither "pervasive" enough in terms of their duration or frequency, nor "severe" enough in terms of their content. Nor did they constitute a pattern of harassment or continuing violation, even if we did include the May 1991 car ride incident.

Even within the context of the intensity of the contract negotiations taking place at the time of these incidents, respondent John Maher's actions were not sufficiently oppressive so as to create for complainant a hostile labor organization environment, particularly since he immediately stopped his behavior after being confronted by complainant. Although it is clear that complainant continued to be upset long after June 1991, and after the conclusion of the contract negotiations, we have found that her upset was not the result of continued harassment by John Maher, but rather a combination of other events both in the Union and back on the BART workplace.

We determine, therefore, that the Department did not establish that respondent John Maher's conduct, in and of itself, rendered complainant's labor organization environment sufficiently intimidating, hostile, or offensive so as to interfere seriously with her emotional well-being and her ability to perform her union duties. The actions of respondent John Maher during June 1991 were not sufficiently severe or pervasive to create a hostile or offensive labor organization environment.

4. Respondent Union as "Employer" of Complainant and Respondent John Maher

In its further argument, the Department also argues that complainant and respondent John Maher should be considered "employees" of respondent Union during the time they were performing services for the Union. Under the Department's argument, respondent Union was complainant's and John Maher's "employer," within the meaning of Government Code section 12940, subdivisions (a) and (h). We need not and do not decide this issue, since we have already applied subdivision (b) to this case and determined that the Department failed to establish that complainant suffered the requisite hostile environment.

B. Failure to Take All Reasonable Steps Necessary to Prevent Harassment and Discrimination from Occurring

The Department also charges that both respondents BART and Union violated Government Code section 12940, subdivisions (h) and (i). Under these subdivisions, both respondent Union, as a "labor organization," and respondent BART, as an "employer,"

have an ongoing and independent obligation to "take all reasonable steps to prevent harassment from occurring" (subdivision (h)(1)) and to "take all reasonable steps necessary to prevent discrimination and harassment from occurring" (subdivision (i)). This obligation is the "Legislature's express mandate that each company operating in this state establish an affirmative anti-harassment program with definite procedures and monitoring," regardless of whether sexual harassment is proven to have occurred in any individual case. (Flait v. North American Watch Corporation, (1992) 3 Cal.App.4th 467, 477-78; DFEH v. County of Madera, supra, 1990-91 CEB 1, at pp. 28-29.)<sup>1/</sup>

1. Respondent BART

The evidence at hearing showed that respondent BART had in place, since 1985, an anti-harassment policy, which it reiterates to its employees on an annual basis, extensive staff training programs regarding discrimination and harassment, and an internal complaint process. Indeed, the Department does not argue that respondent BART's general preventative programs are insufficient or in violation of subdivisions (h) or (i).

Instead, the Department argues that respondent BART failed to take all steps necessary to protect complainant, once BART had sufficient knowledge of complainant's charges of sexual harassment against John Maher and of Gladys Maher's upset with these charges. The Department argues that respondent BART unlawfully delegated to respondent Union its duty to investigate and deal with these charges. We disagree.

The Department's claim rests primarily on the meeting on March 5, 1992, in which Michael Masek, who was both complainant's and Gladys Maher's supervisor, attempted to deal with the upset between the two women caused by the rumors of sexual harassment charges made by complainant against John Maher. At hearing, Masek admitted that he had heard some rumors of complainant's allegations against Maher, but stated that they were about "sex" or "sexual conduct" and not about "sexual harassment" or "unwanted sexual conduct." He understood that

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<sup>3/</sup> As of January 1, 1993, all employers have an additional affirmative obligation to inform their employees about the illegality of sexual harassment. (Gov. Code, §12950.)

complainant had filed some kind of complaint with the Union and that it was taking care of the issue; he thus did not discuss the rumors with either complainant or Gladys Maher. He testified that his job was not to let outside issues spill over into the workplace and that the sole purpose of the meeting was to remind both complainant and Gladys Maher of the rules for appropriate workplace behavior.

Although there may have been better ways for Masek to address the problem between complainant and Gladys Maher, we cannot conclude that respondent BART, by virtue of Masek's actions, committed a violation of Government Code section 12940, subdivisions (h) or (i). Although the workplace was, by that time, rife with rumors about complainant and John Maher, complainant had not identified the issue to respondent BART as one of "sexual harassment." She had not utilized BART's internal complaint procedure or spoken to her supervisor, Masek, about her allegations. Although it was clear that she sought from Masek protection from Gladys Maher and felt that she did not receive it from him, we are unwilling to hold that respondent BART, or Masek as complainant's supervisor, had an affirmative duty to track down rumors about off-site harassment and to determine their truth, particularly in the absence of any complaint from complainant. To the extent that this off-site behavior had a negative effect on the worksite, then, of course, it was Masek's prerogative to step in to resolve the workplace problem; in his own way, this is what he attempted to do.

We therefore determine that respondent BART did not violate Government Code section 12940, subdivisions (h) or (i), by virtue of the actions of its supervisor, Michael Masek.

## 2. Respondent Union

The Department argues that respondent Union violated subdivisions (h) and (i) in several ways. First, **respondent Union did not take steps to deal with respondent John Maher, despite knowledge of his inappropriate conduct with women. Second, respondent Union did not take sufficient steps regarding complainant's specific allegations of sexual harassment. Third, respondent Union did not have in place an anti-harassment policy and complaint procedures, and provided no sexual harassment training to the union leadership or membership during any time relevant to this case.**

Regarding respondent Union's failure to act vis-a-vis John Maher, the Department argues that Union President Milt Waalkens knew of Maher's propensity to harass women and did nothing to control him. It argues that, while at the Hilton in January 1991, Waalkens witnessed John Maher grabbing



Maria Griffin's breast and then refused to deal with Maher, despite Griffin's protests, other than to warn the negotiators at the beginning of the negotiations that their conduct should be professional. Respondent Waalkens admitted being at the Hilton in January 1991 with Maria Griffin and Dennis Kaczor and warning the negotiators about their conduct, but denied that the incident with Maher ever happened.

We cannot credit the testimony of either Maria Griffin or Dennis Kaczor on this issue. Neither Griffin nor Kaczor told the Department consultant investigating complainant's DFEH complaint about the incident in 1993, despite being asked about John Maher's behavior with women. Thus, they were either not telling the truth in 1993 or not telling the truth in 1996 at the hearing. Further, by the time of hearing, both Kaczor and Griffin were admitted political enemies of respondents John Maher and Milt Waalkens and thus had motive for bias. We therefore determine that the Department has not proven that respondent Union knew of any inappropriate conduct on the part of John Maher.

Regarding respondent Union's failure to deal with complainant's specific complaint, the Department first argues that Maria Griffin put respondent Waalkens on notice by a memo dated February 3, 1992, of complainant's concerns about John Maher. The memo recommended that Waalkens remove John Maher as the overseer of the stores department until complainant's issues were resolved and said that complainant had "made several innuendoes" to Griffin "regarding John Maher and his actions." The Department further argues that Frank Lehne's telephone call to respondent Waalkens on February 27, 1992, explicitly put respondent Union on notice of complainant's charges of sexual harassment against John Maher.

Maria Griffin testified that she gave this memo to respondent Waalkens on or around February 3, 1992, but Waalkens denied receiving or seeing it until 1995. Again, Maria Griffin did not mention the existence of this memo to Gordon Piper, the DFEH consultant, and we therefore cannot rely on her testimony. In this instance, however, we believe that the memo existed because of the independent testimony of Larry Gerber, the Local 790 staff person and a neutral witness, who remembered receiving a copy of the memo shortly after the date it was issued.

The memo, however, does not state that complainant felt that she was being sexually harassed by John Maher; indeed, Maria Griffin testified that complainant was never that direct with her. Thus, the memo did not, by itself, put the Union on notice of sexual harassment charges by complainant regarding John Maher.

On February 27, 1992, however, it is clear that complainant's husband, Frank Lehne, put respondent Waalkens on notice of complainant's charge of sexual harassment. Had respondent Waalkens failed to pursue this complaint at this time, we might have found a violation of subdivisions (h) and (i). The evidence showed, however, that Waalkens immediately assigned Larry Gerber to investigate the charges and communicated this to Lehne. The evidence further showed that Gerber unsuccessfully attempted on six occasions to contact Lehne by telephone, leaving messages each time. When he received no response from either complainant or her husband, Gerber wrote Lehne a letter outlining his unsuccessful attempts to reach him and stating that he saw no reason to pursue further investigation of the matter, given Lehne's failure to communicate.

We cannot fault either respondent Waalkens or Larry Gerber for the actions they took. Complainant had, through her husband, registered a complaint of sexual harassment by John Maher and then neither she nor her husband did anything to cooperate with an investigation of the charges. Although we find credible the reasons why complainant did not complain about the harassment earlier during the union negotiations (see Finding of Fact 30), these reasons do not explain why she and her husband failed to participate in an investigation after opening the door and registering a complaint. The Department cannot now prevail on an argument that, under subdivisions (h) or (i), respondent Union should have done more to uncover the truth of the allegations when the logical starting point was to talk to complainant, or at the very least to her husband, to ascertain her specific allegations. Similarly, the Union had no obligation, under subdivisions (h) or (i), to honor Frank Lehne's request that complainant and John Maher be separated, by removing Maher from overseeing the stores department, absent more information regarding the problem.

As to the third issue of respondent Union's lack of preventative measures, the evidence showed that, in February 1992, Maria Griffin, as the Union's Affirmative Action Coordinator, pointed out to respondent Waalkens that the Union had conducted no sexual harassment training. Further, Larry Gerber testified that he and respondent Waalkens had discussed that the Union should develop an anti-sexual harassment policy. Despite this, respondent Union did not provide any such training to its membership and officials until December 1993, and did not create a policy until 1993 or 1994, long after the events in this case. By the time of hearing, however, respondent Union had provided training and developed such a policy. We therefore decline to find it in violation of Government Code section 12940, subdivisions (h) or (i).

ORDER

Both accusations against all named respondents are dismissed in their entirety.

Any party adversely affected by this decision may seek judicial review of the decision under Government Code section 11523 and Code of Civil Procedure section 1094.5. Any petition for judicial review and related papers should be served on the Department, Commission, respondents, and complainant.

This is a precedential decision of the Fair Employment and Housing Commission pursuant to Government Code sections 12935, subdivision (h), and 11425.60.

DATE: November 5, 1997

FAIR EMPLOYMENT AND HOUSING COMMISSION

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LYDIA I. BEEBE

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PHYLLIS W. CHENG

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T. WARREN JACKSON

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ANN-MARIE VILICANA

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MICHAEL M. JOHNSON

CONCURRENCE AND DISSENT BY COMMISSIONER CHENG

I concur in the Commission's decision. This case centered on allegations that a Union member and officer sexually harassed a fellow Union member and officer, while they were engaging in union business. Not only were they engaged in union business, but in the most quintessential of union business -- contract negotiations with BART. The Department should have, at the outset, charged a violation of Government Code section 12940, subdivision (b), which applies directly to a labor organization's discrimination against one of its members. That provision of our Act goes to the heart of this case.

I concur in all aspects of the Commission decision except for page 21, part 2, and page 24, first full paragraph.

CONCURRENCE BY COMMISSIONERS VILICANA AND CHENG

We concur in the decision but write separately to emphasize that labor organizations, as well as employers, have an obligation under Government Code section 12940, subdivision (h), to take affirmative steps to prevent sexual harassment from occurring and to investigate promptly any complaints of such harassment. Such affirmative steps may include the development of an anti-harassment policy, the training of union members and officials, the posting of the Department's anti-discrimination poster, and the dissemination of the Department's information sheet on sexual harassment. And, to the extent that a labor organization is also an employer, the labor organization has additional affirmative obligations under Government Code sections 12940, subdivision (i), and 12950 to create a harassment-free workplace.